

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C.

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In the Matter of)

Streamlining Broadcast EEO)

Rules and Policies, vacating the EEO)

Forfeiture Policy Statement)

and Amending Section 1.80 of)

the Commission's Rules to Include)

EEO Forfeiture Guidelines)

MM Docket No. 96-16

To: The Commission

COMMENTS OF WALKER COUNTY COMMUNICATIONS, INC.

Walker County Communications, Inc., ("Walker County") the licensee of Stations KSAM(AM) and FM, Huntsville, Texas, by its attorneys, hereby submits its comments in response to the above captioned Order and Notice of Proposed Rule Making (the "NPRM"), released February 16, 1996.

1. In its NPRM, the Commission seeks comment on its proposed "improvements and clarifications" to its equal employment opportunity ("EEO") requirements and its proposed guidelines for the imposition of forfeitures for violations of those requirements. In so doing, the Commission states its concern that its EEO requirements may unnecessarily burden "licensees of smaller stations and other distinctly situated broadcasters," and that its proposed changes are intended to provide relief to such broadcasters. Walker County has worked diligently over the years to comply with the Commission's EEO policies. While Walker County commends the Commission for recognizing the difficulties faced by small stations and stations licensed to small markets, Walker County believes that the Commission must go further to eliminate the unfair burdens its EEO policies impose on these licensees.

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I. THE COMMISSION'S EEO RULE AND POLICIES FAIL TO COMPLY WITH THE SUPREME COURT'S ADARAND DECISION

2. At the outset, the Commission has never conducted the kind of analysis of its EEO rule and policies mandated by Adarand Constructors, Inc. v. Peña, 115 S. Ct. 2077 (1995). If that kind of analysis is conducted, it is evident that the FCC's rule and policies do not withstand the strict scrutiny test. Under the strict scrutiny test, a racial or ethnic classification must serve a compelling interest and must be narrowly tailored to serve that interest. See City of Richmond v. J.A. Croson, 488 U.S. 469 (1989). The FCC's EEO program does not serve a compelling interest and is not narrowly tailored. Under Croson, it is the obligation of the government to identify with precision the discrimination to be remedied. General historical societal discrimination is not a sufficient predicate for affirmative action. 488 U.S. at 499. "Amorphous" claims of discrimination in certain sectors or industries are also inadequate. Id. at 499. To the extent that racial or ethnic diversity is the justification for affirmative action, the case of Regents of the University of California v. Bakke, 438 U.S. 265 (1978) teaches that the government must seek some further objective beyond the mere achievement of diversity itself.

3. Any governmental use of race must be narrowly tailored. The test for determining whether a governmental program is narrowly tailored requires consideration of the following factors: (i) whether the government considered race-neutral alternatives before resorting to race-conscious action; (ii) the scope of the affirmative action program, and whether there is a waiver mechanism that facilitates the narrowing of the program's scope; (iii) the manner in which the program is used, that is whether race is a factor in determining eligibility for a program or whether race is just one factor in the decisionmaking process; (iv) the comparison of any numerical target to the number of qualified minorities in the relevant sector or industry; (v) the duration of the program and whether it is subject to periodic review; and (vi) the degree and type of burden caused by the program. See Department of Justice Memorandum, dated June 28, 1995. Even assuming arguendo that the FCC could show a

compelling interest for its EEO rule and policies, the FCC's program fails the narrowly tailored test. While the Commission claims that its EEO program "is an efforts-based approach" which is not implicated by Adarand, the program operates in practice as a quota system. If a license renewal applicant employs fewer than the Commission's EEO parity guideline (50% of the labor force in its MSA), its license renewal application will be subject to deferral, a short term renewal, EEO reporting conditions and even designation for hearing. If a minority group files a petition to deny simply alleging inadequate EEO performance, the Commission's EEO Branch automatically sends out a letter seeking detailed recruiting and hiring information for the preceding three years for both full-time and part-time positions, and action on the license renewal application can be delayed for years. In the case of KSAM, even though the NAACP voluntarily withdrew its petition to deny against KSAM, action on the renewals still dragged on for years. The Commission has not considered race-neutral alternatives to the present system; there is no waiver mechanism; race (and sex) are the sole factors for determining compliance with the affirmative action requirements; there is a numerical target; the program is of unlimited duration; there is no provision for periodic review; and the FCC's rule and policies are extremely burdensome. Thus, the Commission must analyze its EEO rule and policies in light of Adarand, and having done so, the Commission must conclude that the present rule and policies do not withstand scrutiny. Although Walker County submits that a more complete examination of the EEO requirements is required, in the paragraphs below it discusses the proposals in the NPRM.

II. THE COMMISSION SHOULD EXPAND ITS SMALL STATION EXEMPTION TO ITS EEO REPORTING AND RECORD-KEEPING REQUIREMENTS

4. Regardless of a licensee's employment record and even in the absence of any evidence that a station's minority recruiting has been less than exemplary, Section 73.2080 of the Commission's requires non-exempt broadcast licensees to undertake numerous administrative tasks, the vast majority

of which are inordinately time-consuming and expensive. These tasks have been described in the Joint Comments of Named State Broadcasters Associations filed June 13, 1994.

5. The cost of complying with these administrative requirements is high, and, for small stations and broadcasters in small markets, this burden is excessive. Unlike their large, wealthier counterparts, small market broadcasters cannot afford to hire additional employees to work primarily on managing and implementing their EEO programs. Thus, to get the necessary EEO work done, a good portion of the staff at these stations has to pitch in. As a result, instead of focusing on the business of broadcasting, many staffers spend much of their time struggling with the paperwork generated by EEO compliance, and employee productivity inevitably suffers.

6. While stations with fewer than five full-time employees are currently exempt from the Commission's efforts-based EEO requirements, the Commission should go much further to alleviate the burden on smaller broadcast licensees. In its NPRM, the Commission does in fact seek comment on whether it should expand the category of stations receiving this exemption. The Commission asks whether in determining the breadth of this class it should consider not only the size of station staffs, but also stations' market size and the size of the minority labor force in those markets. Walker County believes that the Commission should automatically exempt all stations with fewer than **twenty** full-time employees from the paperwork requirements of its EEO policies.

7. In addition, Walker County believes that stations in smaller markets should also be exempted from these requirements. Such stations have trouble competing for employees with large market stations, which offer higher salaries and greater career opportunities. See NPRM ¶ 21b. Stations in small markets have particular difficulty when those communities are located near a large metro market. Huntsville, for instance, is outside of the Houston market and Walker County loses employees to the Houston stations.

8. Newly exempt stations should be required to file the first page of Form 395-B and Form 396-A, as well as the first two pages of Form 396. That should be the sum total of the reporting requirements. Where a petitioner makes a prima facie challenge to an exempt station's EEO compliance, the Commission should allow this broadcaster to defend itself both by demonstrating that it has never been the target of any meritorious discrimination complaint and by providing a narrative description of its efforts to offer equal employment opportunities to women and minorities and generally comply with the Commission's EEO rules. In addition, under this equitable framework, the Commission could not penalize such a broadcaster for a lack of supporting documentation. On the other hand, the Commission could require such record keeping prospectively if it were dissatisfied with this showing.

III. LICENSEES SATISFYING THE COMMISSION'S PROCESSING GUIDELINES SHOULD ALSO BE EXEMPT FROM THE RECORD KEEPING AND REPORTING REQUIREMENTS, WITH THE COMMISSION WEIGHING STATION SIZE INTO THESE PARITY CALCULATIONS

9. Walker County also believes that the Commission should adopt the "benchmark policy" it proposes at ¶ 25 of the NPRM. According to this proposal, where a station satisfies the Commission's processing guidelines, (as described at ¶ 10 of the NPRM, 50%/25% of parity for stations with 5-10 employees and 50%/50% of parity for stations with 11 or more employees), it would no longer be required to comply with the Commission's EEO reporting and record-keeping requirements. Such relief is essentially the same as that granted to the smaller stations described above. Thus, these stations would only have to file the first page of Form 395-B and Form 396-A, and the first two pages of Form 396, thereby certifying that they meet the criteria for the exemption.

10. Stations satisfying the processing guidelines should be found in presumptive compliance with the EEO Rule and, as with the smaller stations described above, should not be subject to enforcement sanctions in the absence of evidence of meritorious discrimination complaints. Also

similar to the framework laid out above, such broadcasters should be permitted to defend themselves against a prima facie challenge by providing a narrative description of their efforts to comply with the EEO Rule. Again, the Commission should not impose penalties on such broadcasters because of an absence of record-keeping, but could require such record keeping in the future if it were dissatisfied with a given licensee's showing.

11. In addition, the Commission should do more in its processing guidelines to account for the special difficulties faced by smaller stations. The Commission should provide non-exempt smaller stations with additional relief by giving stations extra credit for recruiting minority and female part-time employees. Small market radio stations frequently operate with a large percentage of part-time workers, particularly on weekend and round-the-clock shifts. Part-time work is an excellent break into the communications industry and can serve as a stepping stone for permanent employment, either at that station or elsewhere.

12. In its parity calculations, Walker County believes that the Commission should also account for the presence of non-English language speakers in a given market. Walker County, for instance, operates in a community with a large and growing Hispanic population. With a sizable portion of this population arriving in Texas from Mexico, these new residents frequently have little or no English language skills. As the composition of the workforce becomes increasingly Spanish-speaking, many English-language radio stations in this area will be hard pressed to move their employment statistics into parity with the workforce percentage of Hispanics. Walker County urges, therefore, that the Commission's parity analysis include only the female and minority labor force population with the requisite language skills to perform any station job.

**IV. THE COMMISSION'S FORFEITURE GUIDELINES SHOULD TAKE
ACCOUNT OF SMALLER STATIONS' LACK OF FINANCIAL
RESOURCES**

13. Fundamentally, Walker believes that the Commission's proposed forfeiture guidelines

call for excessively large fines. In particular, the Commission does not sufficiently account for the great gap in resources between large stations in sizable markets and small stations in minor markets. While standard treatment may be theoretically appealing, the economic reality is devastating to small market licensees. In its NPRM, the Commission says that it realizes that its EEO policies do constitute a particular burden for smaller broadcasters, and, again, Walker County commends the Commission for at least recognizing that its policies' impact on smaller stations is a concern. Walker County believes, however, that the Commission must do more to alleviate the financial strain on small-market stations, especially with respect to the size of its forfeitures.

14. Clearly, the economic circumstances confronting Walker County have been, and remain, far less promising than those facing large stations in top twenty markets. As the Commission is undoubtedly aware, the economic climate in recent years in general has not been favorable to small market broadcasters. According to Arbitron, Walker County's community of license, Huntsville, is unranked, outside any ranked metro market. The major employers in the community are the state prison, with over 5,000 local employees, and Sam Houston State University, which hires nearly 2,000 local employees. Walker County must compete with these far larger employers, as well as local hospitals and businesses, for a limited pool of qualified applicants. Walker County's stations have struggled as a result, reducing staff, cutting budgets, and straining to attract advertising dollars. Like other small market licensees, Walker County is less able than its large counterparts to generate additional advertising revenue on short notice, or to cut back on extraneous production costs.

15. Despite these conditions, and despite the fact that Walker County requires fewer hires and operates in a significantly smaller market with smaller applicant pools, the Commission still fined Walker County an amount equal to or exceeding fines handed out to a number of large market stations. In 1994, the Commission proposed to fine Walker County \$31,250 for failing to maintain adequate recruitment records, while KUSC(FM), Los Angeles received a \$17,500 fine, KFSD(FM), San Diego

received an \$18,750 fine, KFSD(FM), San Diego received an \$18,750 fine, and six stations in New York received fines ranging from \$23,750 to \$25,000 for failing to recruit an adequate pool of minority applicants. It is true that the Commission recently reduced Walker County's fine to \$15,000. Memorandum Opinion and Order, FCC 96-226, released May 31, 1996. But a fine of \$15,000 is also way too substantial for a small broadcaster such as Walker County to pay.

16. The proposed forfeiture schedule is exactly the same as the 1994 forfeiture schedule that the Commission vacated. Apparently, the Commission continues to believe that it is appropriate to mete out **higher** fines to smaller licensees than to larger stations for the same behavior. While the inequity of that policy is almost too obvious to point out, it is also clear that even fines **equivalent** to those handed out to large market broadcasters are unfair to smaller stations. With smaller stations drawing on fewer resources and facing a less favorable economic environment, in real terms such fines are far greater than those incurred by their larger counterparts. To remedy this situation, the Commission must alter its EEO forfeiture proposal to account for the inescapable fact that licensees in smaller markets are less able than their top 100 market counterparts to withstand the financial blow of such exorbitant fines.

17. Admittedly, the Commission in its NPRM does not entirely ignore the impact of its forfeitures on smaller stations. The Commission touches on this factor peripherally with the four elements it deems relevant to its downward adjustment analyses. Specifically, the Commission proposes to reduce forfeitures only where there are sufficiently few hiring opportunities, where the minority population is less than 6% of the relevant labor force, where the licensee has demonstrated an inability to pay, or where the station is a stand-alone station located in an Arbitron or Nielsen ranked market of 200 or above. Walker County believes that none of the four factors cited above is sufficiently responsive to that element. While smaller stations are more likely to have few hiring opportunities and be unable to pay the required forfeiture, many of these stations will have more than

five openings during the relevant period, and most are unlikely to satisfy the Commission's historically stringent standard for "inability to pay." Moreover, the fourth factor automatically excludes stations in markets ranked lower than 200. Thus, under the Commission's proposed forfeiture guidelines, a significant number of small stations will fall through the cracks and be debilitated by unfairly large forfeiture requirements. Moreover, forcing such payments from smaller licensees will ultimately prove counterproductive, as these measures will result in cutting employees to pay fines and prevent these stations from being able to invest in the very employment programs that the Commission seeks to encourage. Thus, Walker County strongly urges the Commission to explicitly designate station and market size as primary factors in its downward adjustment analyses.

18. Additionally, some of the terms highlighted by the Commission in ¶ 42 of its NPRM should be interpreted in light of the particular difficulties facing small licensees. Walker County is particularly concerned about what constitutes an "adequate pool" of applicants for EEO purposes. The Commission states that this definition will vary from station to station, and will depend, in part, on the size of the station staff. Walker County strongly urges the Commission to make staff size an **integral** factor in this analysis. As stated above, smaller stations frequently operate with a large percentage of part-time workers, particularly on weekend and round-the-clock shifts. It is therefore more difficult for the remainder of the staff to cover shifts when a worker leaves unexpectedly. As a result, smaller stations do not have the luxury of conducting lengthy searches for the "perfect" candidate; Walker County and other similarly situated licensees must sometimes fill a position as quickly as possible. This situation makes it nearly impossible to comply with elaborate and time-consuming Commission rules and regulations concerning "adequate pools" of applicants and interviewees without substantially hindering the operation of the station.

19. Moreover, the Commission says nothing in its NPRM about the time required for filling a job opening. Frequently, few if any applicants apply for a particular position and the "right"

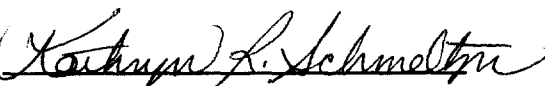
candidate is the first person with the requisite skills to apply. Given that small markets can seldom generate a substantial pool of applicants, Walker County requests that the Commission place a limit on the length of time a job must be held open while the licensee attempts to recruit an appropriate pool and how long it must search for a qualified female or minority applicant before hiring an available, qualified male, non-minority applicant. In addition, small market licensees would benefit from Commission guidance on the number of organizations that should be contacted in a licensee's effort to create its pool. There appears to be no basis for the 66% pool requirement proposed by the Commission and such a requirement is particularly difficult for small market broadcasters to meet. It should be relaxed.

IV. CONCLUSION

For the foregoing reasons, Walker County believes that the Commission's EEO proposal must do more to account for the financial vulnerability of stations in smaller markets. The Commission should expand the category of stations that is exempt from the Commission's reporting and record-keeping requirements, and also shape its processing and forfeiture guidelines to provide for more equitable treatment of these licensees.

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I, Margie Sutton Chew, hereby certify that copies of the foregoing **"COMMENTS OF WALKER COUNTY COMMUNICATIONS, INC."** served via hand-delivery on this 11th day of July, 1996, to the following:

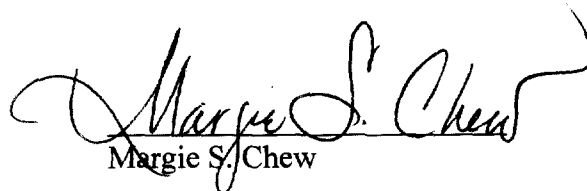
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